NO. 83-5836

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT LEE WILLIE,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

OPPOSITION OF STATE OF LOUISIANA TO WRIT OF CERTIORARI

MARION B. FARMER
DISTRICT ATTORNEY
22ND JUDICIAL DISTRICT
PARISH OF WASHINGTON
STATE OF LOUISIANA

BY: MARGARET A. COON
ASSISTANT DISTRICT ATTORNEY
428 E. BOSTON STREET
COVINGTON, LOUISIANA 70433
PHONE: (504) 892-3090

ATTORNEY OF RECORD

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Respondent State of Louisiana respectfully prays that a writ of certiorari be denied and that review of the judgment of the Louisiana Supreme Court is unnecessary in this case for the reasons set forth below.

STATE'S RESPONSE TO ALLEGATIONS OF EXCESSIVE AND PREJUDICIAL PRE-TRIAL PUBLICITY

The applicant herein alleges that the trial court erred in not granting a change of venue prior to trial on the merits.

Louisiana Code of Criminal Procedure Article 621 sets forth the procedure for changing venue. The applicant makes no assertions that the correct procedure was not followed by the trial court. At issue is only whether the trial court's ruling denying the change was correct. Article 622 sets forth the grounds for change of venue as follows:

"A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.

In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial. (Emphasis added)"

There are a number of Louisiana cases construing Article 622. Clearly, the burden of proof is on the defendant in a motion for change of venue to establish that he cannot obtain a fair trial in the parish where the prosecution is pending. [1] The applicant for the most part ignores Louisiana jurisprudence in his brief, and for good reason: the Louisiana cases do not support his contentions.

There are a number of Louisiana cases which set forth the various elements for consideration in a change of venue ruling. These elements are perhaps most clearly set forth by the Supreme Court of Louisiana in both State v. Bell cases [2] as follows:

"* * * * (1) [T]he nature of pre-trial publicity and the particular degree to which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire."

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1 See State v. Monk, 315 So.2d 727 (1975); and State v. Flood, 301 So.2d 637 (1974).

2 State v. Bell, 315 So.2d 307, at 311 (1975); and State v. Bell, 346 So.2d 1090, at 1098 (1977).

The Supreme Court of Louisiana further listed factors which are relevant to the change of venue inquiry in the second State v. Bell case [3] and in State v. Berry. [4] These additional factors include the degree to which the publicity has circulated in areas to which venue could be changed; the care exercised and the ease encountered in the selection of the jury; the familiarity with the publicity complained of and its resultant effect, if any, upon the prospective jurors; and the peremptory challenges and challenges for cause exercised by the defendant in the selection of a jury.

In his original motion[5], the applicant herein had cited as the grounds for his request for change of venue "great and detrimental prejudice in the public mind" which he alleged was as a result of "great and widespread publicity through news media of all kinds". The applicant stated in his brief to the Supreme Court of Louisiana that hearings on this motion were held on October 8, 13 and 16, 1980. There was little pertinent testimony in the October 8 and 13, 1980, transcripts on the motion for change of venue. The applicant merely called to the stand newspaper representatives who testified to the circulation figures of their respective papers at the initial hearing, the purpose of which testimony is not clear as no connection was ever made between said figures and the case at bar or the prospective jurors. At the October 13, 1980, hearing, the applicant called to the stand a psychiatrist who testified generally about bias and prejudice, and a deputy who testified as to security arrangements for defendant.

The primary hearing on the motion was held on October 16, 1980, with the applicant herein calling three witnesses to the stand. These witnesses were District Attorney Marion B. Farmer, a newspaper reporter, and an in-

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3 Cited supra, footnote 2.

4 329 So.2d 738 (1976).

5 Supreme Court of Louisiana Record, Vol. I, page 148.

vestigator for District Attorney Farmer. The reporter, John Fahey, testified as to an interview he had with Mr. Farmer. Mr. Farmer also testified concerning the same interview, as well as about other murder cases handled by his staff. The investigator, Michael Varnado, testified that he asked John Fahey not to refer to any confession in reporting the details of the case against defendant. The trial court, after listening to all evidence presented by defendant, deferred ruling on the motion to change venue until after voir dire.[6] There was absolutely no showing made by the testimony of the above listed witnesses of prejudice in the mind of the public.

The applicant implies herein that the trial court's refusal to rule on the motion for change of venue prior to voir dire was in itself a denial of due process, but cites no authorities for this unique proposition. A comentator[7] indicates that an accused has the right to offer evidence of pre-trial publicity and community bias at a hearing on a motion for a change of venue, and that a defendant cannot be restricted to an examination of prospective jurors alone to determine whether he can obtain a fair trial in a particular community. But nothing in our positive law or our jurisprudence indicates that a trial judge must rule on the issue immediately upon conclusion of the pre-trial hearing, particularly where the hearing has been so inconclusive as in the instant case. The judge was entitled to consider the voir dire examinations along with the other evidence in reaching decisions as to prejudice.

Since the applicant alleges that prejudice arose in the public mind through news media coverage, it is important to examine the law on this issue as well as the facts of the case at hand. The most recent Louisiana case on point is State v. Albert, 381 So.2d 424 (1980). Albert involved a homicide with various newspaper reports at the time of the murder. Most of the jurors

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6 Transcript, Vol. V, page 102.

7 See "Change of Venue, Work of Appellate Courts 1974-75," by Cheney C. Joseph, Jr., 36 Louisiana Law Review 611, 1975-76.

had heard or read of the case. One of the articles referred to the slaying as one of three sensational murders which took place in the parish during the year. The Supreme Court of Louisiana found the articles to be factual and not inflammatory, and that the trial court ruled correctly in denying a change of venue.

In State v. Sonnier, 379 So.2d 1336 (1979), a double homicide, the Supreme Court of Louisiana found that pre-trial coverage by the news media was extensive and that there was significant public interest in the development of the case. The defense in Sonnier introduced twenty-four newspaper articles, published over a five month period, which ran either on the front page or the city page. The editor of one paper testified that the double murder was the top story of the year. The Court found that while the publicity was extensive, it consisted primarily of factual information reported regarding the events which were transpiring at the time. The Court concluded that the trial judge did not abuse his discretion in denying the defense motion for change of venue.

In State v. Bennett, 341 So.2d 847 (1977), the defense offered nineteen newspaper stories on the crime and the transcripts of several television accounts of the crime. The Court found that while there was extensive coverage of the incident, also a murder, there was no showing that the media reports were other than objective coverage. The Court found that the defendant failed to carry his burden in this case. There was no abuse of discretion by the trial judge in denying the motion for a change of venue.

In State v. Morris, 340 So.2d 195 (1976), the trial judge noted that the parish where the crime was committed is small and rural and a crime the magnitude of aggravated rape would be known to the residents. The Morris defendant presented eivdence of various newspaper accounts of the crime. The Court found that the articles were neither inflammatory nor sensational, but rather were factual accounts of the offense and the grand jury action. It was held that the trial judge was correct in denying the motion for change of venue.

In State v. Berry, 329 So.2d 731 (1976), the Supreme Court of Louisiana found that the defendant had been previously convicted in Orleans Parish of the rape-murder of a student nurse. The prior case had received extensive notoriety because the victim was relative of a prominent public official. In support of his motion, for change of venue in the subsequent case also in Orleans Parish, defendant introduced evidence of news medial publicity about the rape-murder as well as publicity about the case for which he was being then prosecuted. In one of the newspaper articles, an assistant district attorney was quoted as saying:

> "We want to make sure we have him permanently convicted. It's like putting icing on the cake."

Another pre-trial article recounted testimony of witnesses at a pre-trial hearing concerning the facts of the crime and the identification of the defendant in a police line-up. The publicity continued right up to time of trial and also included details of defendant's prior conviction. The Court, in affirming the denial of the motion to change venue, stated:

> ". . . (T)here was absolutely no evidence of the effect, if any, this pre-trial publicity may have had on the state of the public mind regarding the defendant. Although there was testimony that the broadcast coverage extended throughout the entire parish and we assume the newspaper circulation was equally comprehensive, there is no evidence of how many persons viewed the broadcasts and read the articles. There is no evidence in the record of the extent to which prospective or trial jurors were familiar with or affected by the publicity. The headlines of the articles were not inflammatory or overly bold, and the defendant presented no testimony as to their location in the newspapers. (Emphasis added)"

It is clear that Article 622, supra, requires a showing in Louisiana of more than mere knowledge by the public of the facts surrounding the offense for a change of venue to be granted.[8] There must be a showing that there

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[8] See State v. Richmond, 284 So.2d 317 (1973) at 323.

exists an inflamed opinion against a defendant or that warrants a conclusion that a defendant cannot get a fair and impartial trial.[9]

Turning to the facts of the case at hand, the nature of the news articles published about defendant herein is significant. Without exception, the admittedly extensive coverage was factual, objective, and simply recounts of the law enforcement and prosecutorial action as these events transpired. For example, on July 6, 1980, the Slidell Daily Times, in keeping with its policy for balanced and responsible coverage of the case, reported the entry of a plea of "not guilty" by defendant.[10] The same paper on July 16, 1980, reported a benefit picnic and dance to be held for Mark Brewster, another one of appellant's victims who was shot in the head.[11] The Daily Times reported the grand jury indictments as they were returned.[12]

Defendant made no showing prior to voir dire that the news media reports of the case did anything other than inform the public of the crime. Defendant failed to carry his burden of proof and the court judge was correct in delaying his ruling on the motion to change venue until after the voir dire was concluded.

Appellant asserts further that the trial judge should have ruled in his favor on the motion for change of venue at completion of the voir dire examination. To make a determination of this issue, it is important to examine the transcript. Most jurors on voir dire said they had heard or read of the case at some point during its development, but had not formed an opinion and could disregard the previous information.

The applicant alleged in his brief on appeal to the Louisiana Supreme

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9 See State v. Monk, 315 So.2d 727 (1975) at 735, and State v. Smith, 340 So.2d 222 (1976) at 224.

10 Record, Vol. II, page 225.

11 Record, Vol. II, page 227. In State v. Poland, 232 So.2d 499 (1970), the Supreme Court of Louisiana held that publicity relative to funds being raised for the family of the victim of a shooting was insufficient evidence on which to reverse a trial court denial of a motion for change of venue.

12 See Record, Vol. II, pages 200-224.

Court that the jurors were "less than candid", but he cited no words or conduct in support of this contention. Since he has never cited exact instances of duplicity and deception on the part of the prospective jurors in the voir dire transcript, the undersigned counsel has never known which prospective jurors were "less than candid" and at what portions of their testimony the alleged deceit occurred.

A recent case in which the trial court was called upon to decide a motion for change of venue after voir dire was State v. Williams, 385 So.2d 214 (1980). In Williams, all prospective jurors indicated knowledge of the crime obtained for the most part from newspapers and television. This Supreme Court of Louisiana found as follows at page 216, as to pre-trial publicity.

> "The press coverage might therefore be considered extensive within the limited geographical area involved. ... All but one of the newspaper articles introduced by the defendant at the hearing on the motion were purely factual accounts, either of the crime, the ensuing investigation, or the defendant's arrest and subsequent indictment."

The Supreme Court of Louisiana found that the defendant failed to introduce any direct evidence of any widespread prejudice against the defendant by examination of the prospective jurors. The Court found at page 217 that,

> "There was no evidence of any events in the community at large that would indicate that the community or the individuals in it were prejudiced against the defendant.
>
> The defendant having failed to show that he could not get a fair trial in Tensas Parish, either by showing prejudicial pre-trial publicity or evidence of prejudice on the part of prospective jurors, the trial court did not abuse its discretion in denying the motion to change venue. (Emphasis added)"

The result in State v. Sonnier, supra, was similar. In Sonnier, the defense failed to show such prejudice or undue influence in the community as would affect prospective jurors. All prospective Sonnier jurors testified that they could put aside whatever they had heard outside the courtroom, afford the defendant the presumption of innocence, and decide the case solely upon the evidence presented in court, although two prospective witnesses tes-

tified it would be difficult. The Supreme Court of Louisiana affirmed the denial of the motion for change of venue.

There are many Louisiana cases which have held that the decision as to changing venue is within the sound discretion of the trial court and will not be disturbed on review in the absence of any affirmative showing of error and abuse of discretion.[13]

The instant facts should be considered in light of the State v. Bell, supra, guidelines. As we have shown, the pre-trial publicity in this case, while extensive, was factual and informative and not inflammatory. The applicant showed no specific connection of government officials with the release of information to the news media and very little connexity appears from the testimony at the pre-trial hearings. The bulk of the news articles were during the summer of 1980, while the trial was not held until the end of October of that year. The jury was drawn from the entirety of Washington Parish. Neither the applicant nor his victim was a resident of Washington Parish, and neither was shown to have any connections to or family in that area. The applicant showed no other event occurring in Washington Parish which either affected or reflected the attitude of the community or individual jurors toward himself. The applicant further showed no factor likely to affect the candor and veracity of the prospective jurors on voir dire. According to the voir dire transcript, the extensive pre-trial publicity did not have a prejudicial effect on the prospective jurors.

The trial judge was correct in deferring judgment on the motion for change of venue until after the voir dire examination, when he properly denied the motion.

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13 See State v. Felde, 382 So.2d 1384 (1980); State v. Sonnier, 379 So.2d 1336 (1979); and State v. Matthews, 354 So.2d 552 (1978).

U.S. Supreme Court cases where trials were held to be fair despite widespread publicity are Stroble v. California, 343 U.S. 181, 72 S.Ct. 599 (1952); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 (1975); and Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955 (1962).

The applicant cites Irvin v. Dowd, 366 U.S. 717 (1961) in support of his position. In Irvin v. Dowd, this Honorable Court stated at page 722 as follows:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." (Citations omitted)

This Court, however, has held that the above stated rule cannot foreclose inquiry into the partiality of jurors in a given case.[14] But this Court has held that the challenger must show the actual existence of partiality in the mind of the juror, or the juror need not be excused, and that the finding of a trial court ought not to be set aside by a reviewing court unless the error is manifest.[15]

It is important to look at the actual words of the jurors in the instant case to determine whether partiality actually existed in their minds, as per the Reynolds v. United States test, citation footnote 14.

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[14] See Reynolds v. United States, 98 U.S. 145.

[15] See Reynolds v. United States, supra.

The first panel of twelve jurors was called at page 6 of Volume I of the actual trial transcript. Of these, three had never read of this case.[16] Eight had read an early newspaper account of the crime, but had not heard of the case in any other media source. Beginning at page 15, the prospective jurors were asked individually, whether they had formed an opinion as to the guilt or innocence of the accused from what they had read in the newspaper. The first juror stated that he couldn't remember what he had read.[17] Nine said they had formed no opinions. Two jurors, Mr. Burch and Mrs. Thomas, stated that they had formed opinions but that they could disregard anything they had read as well as the opinions they had formed.[18] The State excused Burch and the defense excused Thomas.

The second panel of twelve prospective jurors were called at page 72. Of this second set, four had heard about the case on the radio and read about it in the newspaper, and three of these saw the story on television. Two had never read about the case.[19] The remaining jurors in this set had read an early newspaper account but had not received information from any other source. Four stated that they could not put aside what they had read; the trial judge then excused these four on the court's behalf and called for four new prospective jurors to be seated. Of the new group of four prospective jurors, three had heard about the case in the newspaper and on television and one from the newspaper only. But none of the new group of four actually remembered the facts of the case or had formed any opinion at all.[20]

A new panel of prospective jurors was called. Of this group, one juror stated at voir dire was the first time he had heard of the case.[21] Only

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16 See pages 13 and 14, trial transcript.

17 See page 15, trial transcript.

18 See page 17, trial transcript.

19 See pages 82 and 83, trial transcript.

20 See page 91, trial transcript.

21 See page 146, trial transcript.

one juror had heard about the case on television.[22] All the rest of this panel had read about the case in an early newspaper report, but had heard of it through no other media source. Of this panel, one juror stated that she had formed an opinion about the case and the court excused her on its own motion.[23]

In the next group of prospective jurors called, there were only three people. One of these was excused due to a physical ailment. Both of the remaining people had read about the case in the newspaper and one had discussed the case with others. One had formed an opinion and the court excused him on its own motion. The last person was excused due to family illness.

Two persons were called in order for the parties to select an alternate juror. One of these read a newspaper account of the crime, and the other heard about it on television. Both testified they did not recollect the facts of the case.[24] Both stated that they could be fair and impartial and would base their opinion only on events within the courtroom. Both were accepted as alternates, and the panel was complete.

The State urges this Honorable Court to deny the writ application herein on this issue because there is no manifest error on the part of the trial court, and because the trial transcript herein as set forth above belies no actual existence of partiality in the minds of the prospective jurors in the voir dire transcript of this case.

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[22] See trial transcript, page 145.

[23] See trial transcript, page 147.

[24] See trial transcript, page 180.

STATE'S RESPONSE TO ALLEGATIONS OF IMPROPER CONDUCT OF VOIR DIRE

The applicant alleges that the trial court erred in not granting individual voir dire of prospective jurors.

On appeal to the Supreme Court of Louisiana, the applicant cited only one case in support of his position. That case was Nebraska Press Association v. Stuart, 96 S.Ct. 2791 (1976). The U.S. Supreme Court here considered a case in which a state judge imposed a prior restraint on news media not to publish accounts of a criminal proceeding. The opinion discusses the right to a fair and impartial trial, but the court here is clearly concerned with balancing First and Sixth Amendment protections and guarantees. While the U.S. Supreme Court states at page 2805 that "searching questioning of prospective jurors" may be an alternative to prior restraint of publication, the Court in no place in the opinion mandates individual questioning. Again, the applicant cited no jurisprudence from Louisiana on appeal.

It is clear that the purpose of voir dire examination is to determine the qualifications of prospective jurors by testing their competency and impartiality.[25]

The most recent Louisiana case on this issue was State v. Williams, 383 So.2d 996 (1980), an armed robbery prosecution. In Williams, the defendant contended the trial judge erred in denying his motion to examine prospective jurors individually and outside the presence of each other on voir dire. The Supreme Court of Louisiana held as follows on page 999:

> "In selecting a petit jury panel, details such as whether the jurors should be called singly or by groups are left to the court's discretion. The trial court can and should regulate such matters. La. Code Crim. P. Art. 784, Official Revision Comment (c). The

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[25] See State v. Nero, 319 So.2d 303 (1975).

> calling of prospective jurors in groups, rather than singly, and their examination in the presence of each other does not, in the absence of special circumstances, deny a defendant a fair trial. (Citations omitted)"

Similar results were reached in State v. McAllister, 253 La. 382, 218 So.2d 305 (1969); State v. Robinson, 302 So.2d 270 (1974); State v. Groves, 311 So.2d 230 (1975); and State v. Hegwood, 345 So.2d 1179 (1977). It is clear that there is no provision of Louisiana law requiring sequestration of prospective jurors during voir dire. By authority of all cases cited above, special circumstances must be shown by defendant to justify sequestration.

Article 784 of the Code of Criminal Procedure fixes the standard for selection of the petit jury panel as follows:

> "In selecting a penel, names shall be drawn from the petit jury venire indiscriminately and by lot in open court and in a manner to be determined by the court. (Emphasis added)"

As the comments to that Article explain, "Details such as whether the jurors should be called singly or by groups of two, three, etc., are left to the court's discretion."

In the instant case, the applicant pointed to nothing either at trial or on appeal which might have caused answers given by some prospective jurors to prejudice the views of other prospective jurors. The trial judge's refusal to insulate prospective jurors did not deny appellant a fair trial and was no abuse of discretion.

If reference be made to the voir dire transcript herein, it may be seen that great pains were taken so that individual prospective jurors' opinions were not expressed before the entire jury panel. For example, on page 15, Juror Burch states that he has formed an opinion. The prosecutor replies, "I don't want you to tell me what it is...." Throughout the transcript, no single juror's opinion of the case is expressed which could taint the whole. In every case where a juror stated that he or she had a fixed opinion, the

court excused that juror on its own motion. A sequestration of the panel and individual voir dire was unnecessary and not required by law.

The applicant cites Murphy v. Florida, 421 U.S. 794 (1975), in support of his position. In Murphy, the defendant was convicted of aggravated burglary. The crime received extensive press coverage because of the defendant's past crimes and his flamboyant lifestyle. The record in the case contained scores of articles concerning the defendant. After jury selection at trial, the trial court denied the defendant's motions to dismiss the jury due to partiality and for change of venue. This Honorable Court found that some of the jurors knew of the burglary, and all knew of the defendant's past crimes. This court found that the last of the news articles about the defendant occurred some seven months prior to trial and were factual in nature. This court found that 20 of 78 persons on the original jury panel were excused due to an opinion as to the defendant's guilt. This court concluded as follows at page 803:

> "This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.
>
> In sum, we are unable to conclude, in the circumstances presented in this case, that petitioner did not receive a fair trial. Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permits an inference of actual prejudice. The judgment of the Court of Appeals must therefore be affirmed."

In cases in which this Honorable Court has reversed state court convictions due to newspaper articles, the convictions were obtained in trials which were totally corrupted by the press coverage. These cases are Rideau v. Louisiana, 373 U.S. 723 (1963); Estes v. Texas, 381 U.S. 532 (1965); and Sheppard v. Maxwell, 384 U.S. 333 (1966). None of the three bears any resemblance to the facts of the instant application. Prejudice was presumed in the circumstances under which the trials in Rideau, Estes, and Sheppard

were held. In those cases the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. In Rideau the defendant had "confessed" under police interrogation to the murder of which he stood convicted. A 20-minute film of his confession was broadcast three times by a television station in the community where the crime and the trial took place. In reversing, the Court did not examine the voir dire for evidence of actual prejudice because it considered the trial under review "but a hollow formality" -- the real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras. The trial in Estes had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment. Similarly, Sheppard arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. Of these three cases, this Honorable Court in Murphy v. Florida, supra, at page 799, has stated as follows:

> "The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process."

It should be noted that in none of these cases has this court required that a jury be sequestered during voir dire.

In no place in the transcript is there even a suggestion that the Washington Parish community sentiment was so poisoned against Robert Willie as to impeach the impartiality and indifference of the jurors as set forth above. The trial setting was not inherently prejudicial, and the jury selection process did not permit an inference of actual prejudice. The trial

was not corrupted by press coverage; indeed, a number of prospective jurors testified that they had never even read of the case. The news media did not pervade the proceedings. Very few jurors had heard of the case by either radio or television. The limited juror exposure to news accounts of the crime with which Robert Willie was charged and the subsequent method of jury selection did not deprive this applicant of due process. This assignment of error is without merit.

STATE'S RESPONSE TO ALLEGATIONS OF ERROR IN THE REVIEW BY THE SUPREME COURT OF LOUISIANA AS TO PROPORTIONALITY

The Supreme Court of Louisiana, in its Rule 28, requires prosecutors in death penalty cases to submit a list of each first degree murder case in their respective districts. The lists must include the docket numbers, captions, crimes convicted, sentences actually imposed, and synopses of the facts in the records concerning the crimes and the defendants. Of course, some form of comparative proportionality review is constitutionally required as per Pulley v. Harris, 103 S.Ct. 1425 (1983).

Because his co-defendant, or another defendant in the same district, may receive a less severe sentence does not make the applicant's sentence ipso facto excessive. In Louisiana, co-defendants do not have to receive identical sentences. See State v. Jessie, 429 So.2d 859 (La., 1983); State v. Labure, 427 So.2d 855 (La. 1983); State v. Rogers, 405 So.2d 829 (La.,1981). Before imposing the death penalty, a Louisiana jury must consider both the crime, the particular defendant and aggravating and mitigating circumstances. Thus the Louisiana death penalty statutes are constitutionally correct as per Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972); and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978).

A death sentence is not necessarily disproportionate because one defendant is a factually similar case received life imprisonment. Proportionality is a safeguard against arbitrary and capricious action by a jury.[26] After a death penalty conviction, the Supreme Court of Louisiana reviews the crime and all relevant information on the defendant to discover whether the death sentence in a given case is disproportionate to the penalty imposed in similar cases in a district.[27]

The State of Louisiana respectfully suggests to this Honorable Court that the death penalty in the instant case is not disproportionate to the crime committed or to other crimes in the district because there have been no other crimes since 1976 as heinous as this one. There have been no others which so flagrantly called for the death penalty. It is important to turn to the facts of the case.

At the June 28, 1982 penalty phase hearing, several witnesses testified herein concerning the body of the victim of the murder. Michael Varnado, a district attorney investigator, found the body. At page 126 of the hearing transcript, he testified about the position of the body when he discovered it, as follows:

> "She was laid on top of her blue jeans, nude. Her hands were up above her head and her legs were spread, on her back."

Dr. Paul McGeary performed the autopsy on the victim. He testified beginning at page 136:

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26 See State v. Taylor, 422 So.2d 109 (La., 1982), at page 119.

27 See Louisiana Code of Criminal Procedure Article 905.9.

"This was the body of a young woman who had been dead for about a week. There was extensive drying and swelling of the skin and bloating of the body. There was a great deal of maggot infestation. She had light brown hair. She had a large opening in the skin of the front of her neck extending all the way across her neck and exposing the deep tissues of her neck. She had an opening of the tissues of the palm and thumb of the right hand going up to the index finger. She had tissue loss over the inner aspects of both thighs. She had a laceration of the opening of her vagina. The internal organs were in a state of decomposition because of the long period of time since her death, but she showed no evidence of having had any underlying disease and was in otherwise a condition of good health."

At page 37, the prosecutor questioned Dr. McGeary as follows:

Q. "Now as a result of the autopsy, did you reach or didyou arrive at an expert opinion as to the cause of her death?"

A. "I felt that she had suffered a deep wound at the front of her neck and that she had made some attempt to ward off somebody or some weapon with the right hand having suffered some damage to the right hand, also in that she had the injuries of the inner parts of her thigh, of the genital area and of the vaginal opening, indicating that she had been forcefully subjected to intercourse."

Q. "Insofar as the wound in the neck, would that wound cause death?"

A. "Yes, a deep wound that would involve the windpipe and the blood vessels of the neck would cause death."

Q. "Would it cause an immediate death, sir?"

A. "It would not be immediate in that it would require a few minutes of time for extensive bleeding to occur and for difficulty in breathing if the windpipe were opened and filled with blood."

Q. "Would it be what one might term a painful sort of death?"

A. "Yes."

Q. "Would you expect a person receiving that type of wound to struggle to get breath?"

A. "Yes, certainly."

Q. "Would it be easy for a person like that to speak, with a wound like that?"

A. "Not if the wound went across the windpipe, because that would divert the air from the voice box so that speaking would be not possible."

Q. "Now from the wound to the right hand you observed in the autopsy, is that what is commonly referred to as a defense wound?"

A. "Yes, sir."

Q. "And why would you as a pathologist label that sort of wound as a defense wound?"

A. "A defense wound is a kind of wound that is inflicted on a person's body when they attempt to protect themselves against an attacker. It usually occurs on the palm of the hands if they try to grab hold of a knife or a sharp weapon, that usually occurs on this aspect of the forearms if they are trying to ward off blows. It may occur on the elbows or on the knees or on the shoulders, the edges of the shoulders. The reason it is called a defense wound is the person is trying to defend herself or himself against the onslaught or another person."

Q. "Sir, would you have an expert opinion as to whether or not Faith Hathaway tried to defend herself?"

A. "I would interpret the wound on her right hand as a defense-type wound and that she tried to either grasp something or hold her hand in front of her in a defensive posture."

Q. "Insofar as the injuries that you noted on the inner thighs and the vaginal opening, what was it about those injuries that make you believe in your expert opinion it was forcible intercourse?"

A. "These are the typical and common injuries that occur under these circumstances when thighs are forced apart, there is a tendency for the inner aspects of the thighs to be bruised and to be scraped, the skin to be scraped away, and for the tissue to be bruised. The opening of the vagina characteristically tears when a very forceful sexual attack is made and the laceration that occurs is in a very characteristic position, longitudinal or long ways in the vagina, beginning right at the orifice, the narrowest part, and extending up inside the vaginal canal, the typical kind of stretching, traumatic or injurious lacerations that is casued by forceful intercourse."

Q. "And you would not find this type of injury in say a female who was simply involved in a vigorous act of intercourse?"

A. "No, sir, I would not expect deep lacerations of tissue to be tolerated under those circumstances."

Q. "So, therefore, Dr. McGeary, is it your expert opinion that Faith Hathaway was forcibly raped or that an act of forcible intercourse was performed upon her?"

A. "Yes, sir."

* * * *

PROSECUTOR:

"Your Honor, with the court's permission, I am going to ask one of our secretaries, Mrs. Debbie Mitchell, to step around and I would ask the doctor looking at the photographs to please position her body in the position in which it was found. Debbie, if you will simply lay down this way on the floor."

A. (Witness positions secretary) "Okay, both her hands up high over her head, palms up, both legs were spread very far apart, just about as far apart as they would go and bent just a little bit up like this. This is the way the photograph was pictured."

Q. "Now, Doctor, would you expect that a person that has received the injuries that you observed at autopsy to be found in that position if they had not been held until they were dead or unconscious?"

A. "No, I would not."

Q. "So then would it be your expert opinion that Faith Hathaway was held in that position until she died or became unconscious?"

A. "Yes, sir."

Q. "The legs being spread that far apart would be an uncomfortable position, would it not?"

A. "I would expect, yes."

Q. And so if -- is that one reason that you feel that she was dead when left or unconscious when left in order that they stay that far apart?"

A. "Yes."

Q. "What sort of position, if a person were not restrained until death or unconsciousness, would you

normally expect a person with a wound to the neck to reach in towards that wound?"

A. "Yes, that would be the expected reaction would be for the hands to come up to the area of the injury to attempt to cover it up, for the legs to come together and for the knees to be raised up in a defensive posture, also."

Q. "More or less a fetal position?"

A. "Yes."

Q. "So then it is your expert opinion that Faith Hathaway was held in that position until she died or until very close to death?"

A. "Yes."

Q. "Thank you,sir. Now, Doctor, at autopsy I believe you removed a necklace from the body, is that correct, sir?"

A. "Yes."

Q. "Would you describe the necklace, please."

A. "This was a thin gold chain with a medallion on it and on the medallion on one side it said 'Class of 1980' or 'Class of 80' and on the opposite side, as I recall, it said, 'Dawn of a new decade'."

Q. "And where did you find that?"

A. "It was embedded in the neck."

Q. "Was it embedded in the wound?"

A. "It was right down in the wound."

The cross examination by applicant's attorney began on page 142, as follows:

Q. "Doctor, during your autopsy, was it possible for you to determine when the forcible intercourse took place?"

A. "At -- I determined that that occurred at or near the time of death because of the nature of the injury to the vagina and the associated areas, showing no signs of healing or anything like that."

Q. "Well, could it have happened say within six hours of what you determined to be the time of death?"

A. "I would not expect it to because there was no swelling, there was no evidence that it reacted to the injury, that it was near the time of death."

Q. "Alright. Is it possible that the injury took place after death?"

A. "I don't believe so, no, sir."

Dr. McGeary explained further concerning the victim's vaginal injuries at page 143:

A. "I would expect that this injury would not occur after death because part of the reason that this injury occurs is the resistance, the attempt to resist the penetration which causes the tissues to tighten and to resist and to be, therefore, lacerated. After death there is a tendency for the muscles all to relax, for the tissue to stretch more easily, and I would not expect this to occur post mortem."

According to the pathologist quoted above, the victim herein displayed the below listed evidence of serious physical abuse, torture, and the pitiless infliction of unnecessary pain:

1. deep neck wound involving the windpipe and blood vessels;

2. defensive wound of the right hand;

3. injuries to the inner parts of the thigh;

4. injuries to the deep tissues of the genital area and vaginal opening;

5. extensive bleeding prior to death;

6. difficulty in breathing due to opening of the windpipe;

7. rape or forcible intercourse;

8. limbs held in an uncomfortable position until death; and

9. gold medallion embedded in the neck wound described in #1 above.

The evidence adduced at trial sets this case apart as the most heinous, atrocious and cruel crime committed since 1976, when the Louisiana Supreme Court began considering proportionality.

Further, the evidence at trial was clearly sufficient to support another independent aggravating circumstance. The pathologist's testimony quoted above also indicates that the victim was raped.

In Maggio v. Williams, 104 S.Ct. 311 (1983), the defendant argues that the Louisiana Supreme Court review of the proportionality of his death sentence on a district-wide basis did not ensure that his death sentence had been imposed in a rational and nonarbitrary manner. This Honorable Court stated at page 314, as follows:

> "Williams' challenge to the Louisiana Supreme Court's proportionality review also does not warrant the issuance of a writ of certiorari. The en banc Fifth Circuit has carefully examined the Louisiana Supreme Court's procedure and found that is 'provides adequate safeguards against freakish imposition of capital punishment.' Williams v. Maggio, 679 F.2d, at 395."

This court stated at page 314 that it, "has consistently denied challenges to the Louisiana Supreme Court's proportionality review scheme" that are idential to the challenge raised in Maggio v. Williams. In conclusion, this court stated at page 314, as follows:

> "Our prior actions are ample evidence that we do not believe that the challenge to district-wide, rather than state-wide, proportionality review is an issue warranting a grant of certiorari. Our view remains the same. Nor did Williams convince the lower courts that he might have been prejudiced by the Louisiana Supreme Court's decision to review only cases from the judicial district in which he was convicted. Indeed, the District Court examined every published opinion of the Louisiana Supreme Court affirming a death sentence and concluded that Williams' sentence was not disproportionate regardless whether the review was conducted on a district-wide or state-wide basis. We see no reason to disturb that judgment. Finally, Williams has not shown, nor could he, that the penalty imposed was disproportionate to the crimes he was convicted of committing."

The State urges this Honorable Court to find that this assignment is lacking in merit.

STATE'S RESPONSE TO ALLEGATIONS OF IMPROPER ARGUMENTS BY THE PROSECUTOR

The applicant cites Donnelly v. DeChristoforo, 416 U.S. 637 (1974) in support of his theory that the prosecutor herein made improper remarks to the jury. In this case, a prosecutor expressed a personal opinion as to the guilt of the defendant and also stated that the defense hoped for a verdict less than that charged. This Honorable Court stated at page 642 that ". . . not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very concept of justice'." (citations omitted) This Honorable Court indicates that in order for it to overturn a state-court conviction, at page 643, that a prosecutor must 1) deny "a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel....," or 2) make remarks prejudicial "to a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right." Of the prosecutor's comments in Donnelly v. DeChristoforo, this Honorable Court concluded at page 643:

> "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that examination of the entire proceedings in this case supports that contention."

This Honorable Court noted further at page 646 that attorneys seldom carefully construct closing arguments in toto before the event and that, "improvisation frequently results in syntax left imperfect and meaning less than crystal clear." This court noted at page 645, that the prosecutor's remarks were but one moment in an extended trial. This court further stated at page 647, as follows:

> "While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations."

This court observed the distinction clearly between ordinary trial errors of prosecutors and "egregious misconduct to amount to a denial of constitutional due process," and found no such misconduct in Donnelly.

Closing argument by the prosecutor was also an issue in a writ of habeas corpus in Williams v. Maggio, supra. In Williams v. Maggio, the prosecutor sought to minimize the jury's responsibility for imposing a death sentence by implying that the verdict was merely a threshold determination that would be corrected by the appellate courts if it were not the appropriate sentence. This Honorable Court rejected the applicant's contentions. Justice Stevens concurred, but noted that he did believe the closing argument to have been improper as follows:

> "In my opinion, the argument was prejudicial to the accused, both because it appears to have misstated the law and because it may have led the jury to discount its grave responsibility in determining the defendant's fate. A prosecutor should never invite a jury to err because the error may be corrected on appeal."

Justice Stevens concluded as follows:

> "Moreover, since competent counsel failed to object to the argument at the trial itself, thereby failing to avail himself of the usual procedure for challenging this type of constitutional error, I question whether it can be said that this trial was fundamentally unfair. See Rose v. Lundy, 455 U.S., at 543, 102 S.Ct., at 1216 and n.8 (STEVENS, J., dissenting). Accordingly, though not without misgivings, I concur in the Court's decision to vacate the stay. (Citations omitted)"

In the instant application, the applicant complains to two portions of the prosecutor's closing remarks. The first is at page 189 of the transcript for June 28 and 29, 1982, as follows:

> "Suppose that through an act of God that one of you at the moment that Robert Willie is between her legs and that Joe Vaccaro is holding her hands, that one of us walked up on that scene, nude girl, blindfolded, probably screaming, scared to death, and God willed it that we had a gun, I think almost everyone of us without hesitation would have blown them both away and that we'd have grabbed that little girl and if we had a blanket we'd have wrapped her, and we would have hugged her, and we would have been proud of ourself that we saved her life, that we kept her from being raped, and we wouldn't have had one bit of remorse that we used the gun and we'd have been right under the law. The law says that we would have been right to do exactly what we did. Well, if we have that right and the law says that we have that right, as it does, then we also have the right to impose the ultimate penalty on Robert Willie."

The prosecutor above was correctly stating Louisiana law. Louisiana Revised Statute 14:22 provides as follows:

> "It is justifiable to use force or violence or to kill in the defense of another person when it is reasonably apparent that the person attacked could have justifiably used such means himself, and when it is reasonably believed that such intervention is necessary to protect the other person."

There was no objection to this portion of the closing argument.

The second portion objected to by the applicant occurs at pages 192 and 193 of the same transcript as follows:

> "* * * Why is the only punishment death? Because if we as a community, if you as a group of citizens are going to say that life is valuable, you are going to say that Faith Hathaway had a right to live. If you believe that that little girl had a right to live, a right to go about her life, she may have never married a senator or president, but she was trying to do something constructive with her life. She was going in the service. It's not easy for somebody to do. But if you are going to say that she had a right to live, which she certainly did, and that Robert Willie didn't have a right to take her life, then as punishment for Robert Willie taking her life, you're going to give him life, where is the justice of it? If you're going to hold anything holy about the life of Faith Hathaway, if you're going to say that it has any value at all, you've got to say the death penalty, because otherwise you're saying Robert Willie, you life is more valuable than Faith Hathaway's, you life means more than Faith Hathaway. I certainly hope that you can't say that. The evidence certainly doesn't indicate that his life

> is even close to the value to that of Faith Hathaway, but even being putting a value on it, the two lives. He took her life. He deserves that."

This portion of the closing argument is of course not a statement of law and was not intended to be a statement of law. It is purely argument. It was not objected to at the time of the argument.

The instant arguments certainly are not misstatements and do not constitute a failure to observe the fundamental fairness essential to our concept of justice. They do not deny Robert Willie the benefit of any provision of the Bill of Rights or prejudice a specific right. Examination of the transcript in this case supports the State's contention that these remarks, a moment in a protracted trial, did not infuse the trial with unfairness or prejudice, and do not constitute prosecutorial misconduct. For these reasons, this assignment of error also lacks merit.

CONCLUSION

For all the reasons set forth above, the petition for certiorari should be denied.

Date: January 23, 1984.

RESPECTFULLY SUBMITTED:

MARION B. FARMER
DISTRICT ATTORNEY
22ND JUDICIAL DISTRICT
STATE OF LOUISIANA

BY: Margaret A. Coon
MARGARET A. COON
ASSISTANT DISTRICT ATTORNEY
428 E. BOSTON
COVINGTON, LOUISIANA 70433
PHONE: (504) 892-3090